the propriety of confirming the sale or of selling the lands in the bill and proceedings mentioned.

Reversed.

KEITH, P., and CARDWELL, J., absent.

Note.

This case is commented on editorially in February number of "The Law Register," p. 814.

MERRYMAN *et al. v.* HOOVER.

Nov. 21, 1907.

[59 S. E. 483.]

1. **Ejectment—Outstanding Title—Invalidity—Evidence.**—Code Va. 1904, § 2725, provides that no person shall bring ejectment unless he has a subsisting interest in the premises claimed and right to recover the same or the possession thereof, or some share, interest, or portion thereof. Held, that where there was an outstanding title in another when plaintiff brought ejectment, which continued for 10 years after the suit was begun, and until a few months before the trial, evidence was inadmissible to show that after such period such outstanding title had been adjudged ineffective as against plaintiff, under the rule that plaintiff in ejectment must recover on the strength of his own title as it existed when the suit was commenced.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, § 28.]

2. **Same—Subsisting Interest.**—Where P. and wife, under whom plaintiff claimed part of the lands in controversy, had executed a deed purporting to convey the fee to a corporation, which deed was duly recorded, it disrupted plaintiff's paper title, and, being outstanding and uncanceled at the time plaintiff sued in ejectment, constituted a defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 17, Ejectment, §§ 16-21.]

3. **Tenancy in Common—Adverse Possession.**—In ejectment, a charge, requested by plaintiff, that if the adverse possession claimed by defendant was interrupted at any time from the death of C., and if C.'s heirs had been under disabilities since that date, then there could have been no new adverse possession as against them, and therefore "no adverse possession as against the other parties in interest, their co-tenants," was properly modified by striking the clause quoted; the rule being that each tenant in common is entitled to sue according to his own capacity, regardless of disabilities of others.

4. **Writ of Error—Refusal of Instructions—Prejudice.**—Where the

court correctly charged on adverse possession, giving the general principles of law and leaving their application to the jury, plaintiffs were not prejudiced by the refusal of an instruction attempting to summarize the facts proved, and charging that on those facts, if believed, adverse possession was not proved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4229; vol. 46, Trial, §§ 651-659.]

5. Ejectment—Location of Land—Jurisdiction.—In ejectment, a request to charge that if part of the land in controversy was in West Virginia, and had been forfeited to that state for taxes, defendant could not acquire adverse possession thereof while it belonged to the state, and his inclosure of such land with land in Virginia could not constitute adverse possession of the Virginia land, was properly refused, the Virginia court being without jurisdiction of the West Virginia lands, and the forfeiture thereof, if any, being ineffective against defendant's adverse possession of lands in Virginia.

6. Writ of Error—Instructions—Refusal—Prejudice.—Plaintiffs, in ejectment, requested an instruction that if a certain survey including the land in controversy was assessed in the name of plaintiffs' grantor and sold in 1886 for unpaid taxes and was bought in by the State Auditor, and the land remained unredeemed until 1900, then the period from the date of sale to the institution of the suit should not be included in the period of defendant's adverse possession. Held, that the refusal thereof was not prejudicial to plaintiffs, since if the title was outstanding in the commonwealth, and was not restored to plaintiffs until after the commencement of the suit, they could not recover; the redemption in 1900 being after the suit was commenced, and the outstanding title at the commencement of the suit being fatal to plaintiffs' case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4229.]

Error to Circuit Court, Rockingham County.

Ejectment by Mary C. Merryman and others against Isaac Hoover. From a judgment for defendant, plaintiffs bring error. Affirmed.

The following are the instructions referred to in the opinion:

"(4) The court further instructs the jury that if they believe from the evidence that the adverse possession claimed by the defendant was broken and interrupted at any time after the month of October, 1880, the date of the death of Edward Nicholas Clopper, and if they further believe from the evidence that the heirs at law of the said Edward Nicholas Clopper have been under disabilities since the said date, then there can be no new adverse possession as against them, and, there being no adverse possession as against them, there can be no exclusive and adverse

possession as against the other parties in interest, their co-tenants, and they must find for the plaintiffs.

"(5) The court further instructs the jury that if they believe from the evidence that the lands in controversy have been used for 15 years prior to the institution of this suit for the grazing of live stock upon it, that it is not inclosed by a permanent and substantial fence, and that those who have lived upon it in a great many cases have not remained upon it during the winter seasons, but that the premises have been frequently left vacant from the fall of the year unto the spring of the year following, and, moreover, that in in one or more years the land was not occupied in the summer, except in the grazing of cattle, during the pasture season, then such use of said lands was not continuous, actual adverse possession, even though cabins or houses were built upon the property, and if they further believe from the evidence this is the only adverse possession proven, they must find for the plaintiffs.

"(6) The court further instructs the jury that if they believe from the evidence that the Keister and the three Camphor tracts of land lie on the top of the Shenandoah Mountain, and that part of the said several tracts of land lie on the West Virginia side and part on the Virginia side, as shown by the black lines on the plats made by Jasper Hawse, the surveyor, filed with his report of survey, and that the title under which the defendant claims said tracts of land was forfeited on the West Virginia side by failure to enter said tracts of land upon the land assessment books of Pendleton county, in the state of West Virginia, for the years 1869 and 1874, and some years thereafter, and that said tracts of land were sold by the commissioners of school lands for the county of Pendleton, and the title vested in others on April 13, in the year 1887, they are further instructed that no adverse possession of such parts of said tracts of land lying on the West Virginia side can be claimed as against the state of West Virginia, so that the defendant could only plead adverse possession to such parts of said tracts of land, since the date of said sale.

"And if they further believe from the evidence that the inclosure under which the defendant claims actual possession of said tract of land included within it those parts of said land which lie in the state of West Virginia, and which are forfeited as aforesaid, then the possession of the remainder of said tracts of land was not exclusive, and could not be availed of by the defendant during that period, as adverse possession of the parts of said land lying in the state of Virginia.

"(7) The court further instructs the jury that if they believe from the evidence that the tract of land, known as the 'Chambers & Clopper survey,' which includes the tracts of land in contro-

versy in this cause, was assessed upon the land books of Rockingham county, in the name of James B. Price, and that said tract of land was sold in the year 1886 for the taxes of 1876 to 1883, and was bought by the Auditor of the state of Virginia for the benefit of the state, county, and district, and that said tract of land remained unredeemed until the 28th day of April, 1900, then they are further instructed that the period from the date of said sale to the auditor as aforesaid to the time of the institution of this suit must not be included in the period of 15 years, during which the defendant must show adverse possession in order to claim title by such possession to any part of the said tract of land."

The court granted instructions Nos. 1, 2, and 3 as prayed for, but modified instruction No. 4 by erasing therefrom the words: "And, there being no adverse possession as against them, there can be no exclusive and adverse possession as against the other parties in interest, their co-tenants, and they must find for the plaintiffs."

And then granted said instruction No. 4, and rejected in toto instructions Nos. 5, 6, 7 and 8.

John E. Roller and *Sipe & Harris,* for plaintiffs in error.
Conrad & Conrad, for defendant in error.

KEITH, P. Mary C. Merryman and others filed their declaration in ejectment at August rules, 1895, in the circuit court of the county of Rockingham against Isaac Hoover, to recover certain real estate therein described. Hoover appeared and disclaimed title and interest as to certain parts of the land demanded, and as to the residue pleaded not guilty. The jury sworn in the case on the 4th of October, 1905, found a verdict for the defendant, upon which judgment was entered, and the plaintiffs procured a writ of error from this court, in their petition assigning as errors committed by the trial court:

First, That, after the plaintiffs had introduced their evidence of title to the lands in controversy, the defendant offered a deed from James B. Price, under whom plaintiffs claim in part to the Rawley Iron & Coal Company, bearing date the 14th day of June, 1883, and duly admitted to record in the clerk's office of Rockingham county on the 18th day of June of the same year, which purported to convey the land in dispute in fee simple; it being intended by the defendant, by the introduction of this deed, to show that, in so far as they claimed under James B. Price and his heirs, there was such an outstanding title in another as defeated the right of plaintiffs to recover.

In order to meet this contention, the plaintiffs offered in evidence the record of the chancery cause entitled Price, etc., *v.* Rawley Iron & Coal Company, including a final decree therein,

entered on the 6th day of June, 1905, before the trial of the ejectment suit, holding that the deed of the 14th day of June, 1883, and the deed of trust executed by the Rawley Iron & Coal Company contemporaneously therewith on the lands in controversy, constituted no blot upon the title of those claiming under James B. Price and the heirs at law of Nicholas Clopper, deceased, and no impedient to the assertion of their title. To the introduction of this record the defendant objected, on the ground that all that was necessary to defeat the action of the plaintiffs was for the defendant to show that such outstanding title existed at the date of the commencement of said action, to wit, on the 13th day of August, 1895; and inasmuch as the deed of June 14, 1883, was duly admitted to record on the 18th day of June, 1883, and there had been no reconveyance of the land to the plaintiffs, or those under whom they claim, before the 13th day of August, 1895, such outstanding title at the time the suit was brought was conclusive of the right, of the plaintiffs, and it was not competent for them to show that the alleged outstanding title had been divested in any way, or that the plaintiffs; or those under whom they claimed, had been reinvested with title to the land in controversy subsequent to the date of the institution of the suit. This objection was sustained by the circuit court, which refused to permit the record in the chancery cause to be offered in evidence.

The precise contention of plaintiffs in error upon this point is that while it is true that a plaintiff in ejectment must recover upon the strength of his own title, and not upon the weakness of that of his adversary, and that an oustanding title in another may be shown in order to defeat the plaintiff's right of action, such outstanding title must be a present outstanding operative, and available legal title on which the owner can recover against either of the contending parties if asserting it by action.

Section 2725 of the Code of 1904, treating of actions in ejectment, says: "No person shall bring such action unless he has at the time of commencing it a subsisting interest in the premises claimed, and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof."

It would seem that this section is conclusive; but we will supplement it by the addition of adjudicated cases.

In Suttle *v.* R. F. & P. R. Co., 76 Va. 284, Judge Staples, speaking for the court said: "The doctrine generally understood in Virginia is that in ejectment the plaintiff must show a legal title in himself, and a present right of possession under it at the time of the commencement of the action. To this doctrine some exceptions exist; for instance, one in peaceable possession, and ousted by a stranger without title, may recover in ejectment on the strength of his mere previous possession; and a tenant is estopped to deny the title of his landlord."

None of the exceptions, however, exist in this case, and need not be considered.

In Warrevelle on Ejectment, at section 228, it is said: "The same principle, which, under the old practice, when the names of fictitious parties were used, prevented a recovery by the plaintiff unless he showed himself entitled to the possession at the time of the demise laid in the declaration, has remained practically unchanged through all the mutations to which the action has been subjected. The plaintiff must recover, if at all, upon his legal title as it stood at the commencement of the suit, or, as stated by many of the authorities, at the time alleged in the declaration that he had title; and it nas been held in some cases that where the title displayed in evidence is shown to have accrued after such time, even though before the commencement of the suit, he cannot recover. The general rule, however, is as first stated, and under this rule, if the plaintiff is without legal title at the time of commencement of his suit, he cannot recover, notwithstanding he may have had an equity which ripened into a legal title after the suit was brought. He must recover, if at all, upon his title as it existed at the institution of his suit, and, even though he has the legal title, yet if at the time suit was commenced his right of possession was intercepted for any valid cause, he cannot recover, even though such intercepting cause is subsequently removed." Numerous authorities are cited in the note to this section which fully sustain the text.

To the same effect is Newell on Ejectment, p. 360, § 7.

In Tyler on Ejectment, p. 75, it is said that "the rule at common law, and in all of the states which have preserved the distinction between legal and equitable titles to land, is that the plaintiff in ejectment must show a legal title in himself to the land he claims, and the right of possession under it, at the time of the demise laid in the declaration, and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery." There are cases which hold that after the purpose of a trust deed has been satisfied the cestui que trust may maintain ejectment upon a demise in his own name, although the legal estate is still in the trustee. Hopkins *v.* Ward, 6 Munf. 38. But, without expressing any opinion upon that line of decisions, it is sufficient to say that the ease before us is not within them, for here there is an absolute deed from James B. Price, under whom plaintiffs in error claim, to the Rawley Iron & Coal Company, and a deed of trust executed by the Rawley Iron & Coal Company to the Guarantee Trust & Safe Deposit Company of Philadelphia, a corporation chartered under the laws of the commonwealth of Pennsylvania.

In Adams on Ejectment (1854 Ed.) p. 33, it is said to be a

maxim of our law "that the party in possession of property is considered to be the owner until the contrary is proved. It is necessary, therefore, for a claimant in ejectment to show in himself a good and sufficient title to the disputed lands. He will not be assisted by the weakness of the defendant's claim, for the possession of the latter gives him a right against every man who cannot establish a title; and, if he can answer the case on the part of the claimant by showing the real title to be in another, it will be sufficient for his defense (excepting of course those cases in which the defendant is estopped from disputing the claimant's title) although he does not pretend that he holds the lands with the consent, or under the authority of the real owner."

The doctrine as to the title upon which a plaintiff must recover, if at all, in an action in ejectment, established by the cases and text-writers already quoted, is maintained in all its rigor by the Supreme Court of the United States. See McNitt *v.* Turner, 16 Wall, 352, 21 L. Ed. 341; Moorehouse *v.* Phelps, 21 How. 294, 16 L. Ed. 140; Sheirburn *v.* De Cordova, 24 How. 423, 16 L. Ed. 741.

The outstanding title under consideration is evidenced by a deed from James B. Price and wife, under whom the plaintiffs claim part of the lands in controversy, purporting to convey an absolute title in fee simple to the Rawley Iron & Coal Company, a corporation of this state. The deed was executed on the 14th day of June, 1883, and was admitted to record on the 18th day of the same month. The Rawley Iron & Coal Company, grantee in the deed from Price, conveyed the same land to the Guarantee Trust & Safe Deposit Company of Philadelphia, a corporation chartered under the laws of the commonwealth of Pennsylvania, and this deed was admitted to record on the 18th of June, 1883. The suit in the chancery, brought with the object of canceling these deeds and reinvesting the plaintiffs with the legal title, was not instituted until April, 1901, six years after the institution of the action in ejectment; and the final decree was not entered until the 16th day of June, 1905, ten years after the institution of the action in ejectment, and a few months before it was tried. The effect of those deeds was not only to constitute a sufficient ground of defense to the action of ejectment by showing an outstanding title in another, but they went to the very root and heart of the plaintiffs' case, broke in upon and disrupted their paper title, and established beyond controversy that at the date of the demise laid in the declaration and at the institution of the suit they did not have "a subsisting interest in the premises claimed and a right to recover the same, or to recover the possession thereof, or some share, interest or portion thereof." Code 1904, § 2725.

We shall deal, however, more specifically with the contention

of plaintiffs in error. Their position is that while they must recover upon the strength of their own title, and not upon the weakness of that of their adversary, yet, if the defense rests upon an outstanding title in another, that title must be shown to be one which was a present, subsisting, operative legal title at the time of the trial of the case, and that at the time of the trial a court of competent jurisdiction had annulled the deeds from Price to the Rawley Iron & Coal Company and from that company to the Guaranty Company; and that, therefore, it was not a present, outstanding title in another.

We think it has been made to appear that plaintiffs in error did not show a legal title in themselves at the institution of the suit; but, taking their case as they present it, they must equally fail.

With respect to the general principle as to the character of outstanding title which may be relied upon as a defense, there can be no doubt. It is fully established, so far as this court is concerned, by the decision in Reusens *v.* Lawson, 91 Va. 243, 21 S. E. 347, where Judge Buchanan says: "An outstanding title, sufficient to defeat a recovery in an action of ejectment, must be a present, subsisting, and operative legal title, upon which the owner could recover if asserting it by action." For instance, if the statute of limitations constituted a bar to the outstanding title, it could not be set up as a defense; but to hold that a plaintiff could after the institution of his suit acquire from another an otherwise valid title, and thus make good the defect in his own title, would be at war with the fundamental principle recognized in all common-law courts by innumerable adjudicated cases by all the text-writers, and crystalized into a statute in this state, that the plaintiff in an action of ejectment must have in him the legal title at the institution of his suit.

We shall now consider the authorities relied upon by plaintiffs.

In Jackson *v.* Todd, 6 Johns. (N. Y.) 257, the facts are somewhat complicated, but a careful reading of the report will show that the deed from Dunbar, under whom Jackson claimed, to Brooks, which the defendant Todd relied upon as defeating the chain of title from Dunbar through Macy and others to Jackson, the plaintiff, was not a subsisting outstanding title at the date of the institution of the suit.

In Jackson *v.* Hudson, 3 Johns. (N. Y.) 375, 3 Am. Dec. 500, the general principle as to the character of the outstanding title as set out in Reusens *v.* Lawson, supra, is affirmed, and under the circumstances of that case it was held that the lapse of time during which no claimant under the alleged outstanding title had appeared had been so great that the presumption was irresistible that it was no longer a subsisting title; and the further and decisive objection made to the outstanding title that it did not appear to have been duly executed.

The case of Perryman's Lessee v. Callison, 1 Tenn. 515, is cited to show that, where the defendant is permitted to set up a title in a third person, the plaintiff, having first shown a prima facie good title in himself at the time of bringing the action, may show that since the issue joined he had procured the title of such third person. And the case, upon inspection, seems to be authority for that proposition. Turning, however, to the case of Miller's Lessee v. Holt, 1 Tenn. 308, the question was whether it was competent for the defendant to show a better subsisting title out of the lessor of the plaintiff, and the court said: "Possession is always favored, and of itself, with color of title, is a title against all the world, except the person having the best title. The law of England on the subject is too clear to admit of doubt, nor could any reason be seen why the law should not apply here as well as there."

In Crockett v. Campbell, 2 Humph. 411, the Supreme Court of Tennessee held that deeds made after the commencement of a suit, confirming and ratifying deeds made before the commencement of the suit, are admissible in evidence; the court saying: "If the deeds confirmed were executed and properly proved and registered before the suit was commenced, they would pass the title by force of this confirmation, and vest it in the bargainee from their date. The deed of confirmation makes the acts of the attorney good at the date they were performed."

In Lewis v. Curry, 74 Mo. 49, it was held that a plaintiff in ejectment may recover upon a deed obtained after the date of the demise laid in the petition; but, upon looking to the facts, it will appear that, while the deed was obtained after the date of the demise laid in the declaration, it was prior to the institution of the suits; the court saying in its opinion that there is nothing in the point that the demise laid in the petition is the 1st day of March, 1876, while the deed was made on the 27th day of April, 1876.

In Martin v. Parker, 26 Tex. 253, much relied upon by plaintiffs in error, the court, speaking of the outstanding title in that case, said: It would seem that it "was barred by the statute of limitations when set up by the intervenor; or, if not barred, it was extinguished by having been bought in by the plaintiff before the trial. It was not a present, subsisting, and operative title at that time, and could not, therefore, defeat a recovery by the plaintiff. The latter, having prima facie a good title at the time of instituting the suit, had a right to protect himself by buying in the outstanding title, even after issue joined"—citing the cases which we have already considered. That case seems to be authority for the position of plaintiffs in error, but it stands alone.

In Mexie v. Lewis, 87 Tex. 208, 22 S. W. 397, it is said: "It is laid down in this court as a general rule that the plaintiff in

an action of trespass to try title must recover upon his title as it existed at the time of the institution of the suit; and that in order to avail himself of an after-acquired title, he must amend so as to avail himself of it as a new cause of action." An exception has been recognized in a case in which the plaintiff when he brings his suit has the superior title as against the defendant, and subsequently buys an outstanding title for the protection of that which he formerly held. Martin *v.* Parker, 26 Tex. 254. This case does not fall within that exception. Nor, in our opinion, does it come within any other exception which has been recognized by this court.

Willson *v.* Braden, 48 W. Va. 196, 36 S. E. 367, maintains the general proposition that "an outstanding title in a third person, in order to defect the plaintiff's recovery in ejectment, must be a present, subsisting, legal title, not one barred by the statute of limitations, abandoned, or otherwise lost. It must be one which the party owning it could now assert. The burden is on the defendant to show the present validity of such title." But it is not authority for the proposition that it may be acquired by the plaintiff in ejectment after the institution of his suit, in order to mend a gap in his own title.

We are of opinion, therefore, that there was no error on the part of the circuit court in refusing to permit the record of the chancery suit of Price *v.* Rawley Iron & Coal Co. to be introduced in evidence in this case.

We think the modification made by the court in instruction No. 4, offered by plaintiffs in error, was clearly right, and that the law is correctly stated in Malone on Real Property Trials, p. 293, where it is said: "If several tenants in common, having a cause of action, one of whom is under disabilities and the others not, those under no disabilities will be barred by the statute, while the one under disabilities may recover. Each tenant in common has a right to sue and recover his interest. Therefore it is no excuse to say that a co-tenant was under disabilities."

We think that there was no error to the prejudice of plaintiffs in error in refusing instruction No. 5, even though it be conceded that it correctly propounded the law, for the court subsequently, at the instance of defendant in error, gave to the jury correct instructions upon the subject of adversary possession, very properly confining itself to the general principles of law controlling in such cases and leaving it to the jury, subject to the supervision of the court, to apply the principles to the facts in issue, rather than undertake to summarize those facts gathered from a voluminous record and present them to the jury, as was done in the instruction asked for, at the peril of omitting some fact which the evidence tended to prove, or of embracing some fact not sufficiently proved. This court has said in numerous cases that

the refusal of an instruction, even though it correctly propounds the law, will not be ground for reversal if other instructions to the jury upon the same subject were sufficient to enable them correctly to apply the facts. The same principle obtains in other courts.

In Armstrong *v.* Morrill, 14 Wall. (U. S.) 120, 20 L. Ed. 765, it is said: "Where the instructions given were in all respects sufficient to dispose of the controversy, it is not error to refuse to give further instructions."

Instruction No. 6, offered by plaintiffs in error, was properly refused. The circuit court of Rockingham county had no jurisdiction over the land lying in West Virginia, and the forfeiture, under the law of that state, of so much of those parts of the original tracts of land as lay within its borders, could not affect defendant's title by adversary possession to lands lying within this commonwealth and within the jurisdiction of the circuit court of Rockingham county.

Nor were plaintiffs in error prejudiced by the refusal of the court to give instruction No. 7, for, if the facts upon which that instruction is predicated be true, then the plaintiffs were out of court; for the same title in the commonwealth which was sufficient to disrupt the continuity of defendant's adverse possession was equally efficacious to break the plaintiffs' chain of title. In other words, if the title was in the commonwealth at the institution of the suit, and was not restored to plaintiffs in error until the 28th of April, 1900, then upon the authorities considered with reference to the first assignment of error there could be no recovery, for, as was said by this court in Reusens *v.* Lawson, supra, "there is no reason why a defendant in an action of ejectment should not be permitted to rely upon an outstanding legal title in the commonwealth. The plaintiff must rely upon the strength of his own title; and, if it appear in the cause that the legal title is in another, whether that other be the defendant, the commonwealth, or some other person, it shows that the plaintiff has not the legal title, and it is therefore sufficient to defeat his recovery."

In support of this assignment, plaintiffs in error rely upon Armstrong *v.* Morrill, supra. In that case (which, by the way, went from West Virginia, and involved to some extent a construction of the laws of that state prior to 1861) the defendant relied upon adversary possession, and it appeared from the facts that, during a part of the period necessary to bar the plaintiff's action under this plea, the title had been forfeited to the state, and the court held that this broke the continuity of the adversary possession, and that the two disjointed parts could not be computed in order to maintain the plea; the court saying: "Continuity of possession is one of the essential requisites to constitute

such adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession, the seisin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseisin, and it is equally well settled that, if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute a new adverse possession for the time limited must be taken for that purpose." But it also appears in that case that, before the institution of the suit, the plaintiff had redeemed the land which had theretofore been forfeited to the commonwealth, and his full fee-simple title had been restored to and was vested in him.

Upon the whole case, we are of opinion that the jury was correctly instructed, and, without discussing the evidence in detail, that the facts were sufficient—certainly when viewed as we are bound to view them as upon a demurrer to evidence—to sustain the verdict of the jury.

The judgment of the circuit court is therefore affirmed.

Affirmed.

Note.

The counsel in this case put much reliance on the Tennessee case of Perryman's Lessee *v.* Callison, 1 Tenn. 515, and the court seems to have been troubled by this apparently contrary ruling, as it was said in reference to that decision, "And the case, upon inspection, seems to be authority for that proposition." But the fact of the matter is that this decision was overruled in Tennessee in 1822 in the case of Garner *v.* Johnston, Peck 23.